DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WEI OI CHAN, Petitioner Employer, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, JESUS TORRES, Respondent Employee, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Respondent Party in Interest.	)	1 CA-IC 09-0073 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action-Industrial Commission

ICA CLAIM NO. 20050-340339

CARRIER CLAIM No. None

Administrative Law Judge Michael A. Mosesso

AWARD SET ASIDE

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B A R K E R, Judge

¶1 Wei O. Chan ("Chan"), the uninsured employer, contests the administrative law judge's ("ALJ's") award granting Jesus Torres ("Torres") benefits and supportive care following an industrial injury. For the following reasons, we set aside the award.

Facts and Procedural History

¶2 On March 19, 2004, Torres, an employee of Chan's Chinese restaurant, suffered a lower back injury when he slipped and fell on stairs while making a food delivery. On August 30, 2007, the Industrial Commission of Arizona ("ICA") found Torres sustained a compensable injury and awarded him benefits. The Special Fund, which pays benefits to injured employees of uninsured employers, then began processing Torres' claim and allowed Torres to seek medical treatment with Dr. Bogdan Anghel in 2008. *See* Ariz. Rev. Stat. ("A.R.S.") § 23-907(C) (Supp. 2009) (authorizing Special Fund to pay benefits to injured employees). On November 13, 2008, Dr. Anghel found Torres had reached maximum medical improvement but required supportive care. On November 20, 2008, the Special Fund issued a notice of determination terminating Torres' temporary compensation and

active medical treatment on November 13, 2008, and finding the industrial injury resulted in no permanent disability. The Special Fund subsequently issued a notice of determination of supportive care benefits, which authorized Torres to have three office visits, twelve physical therapy visits, and three radio frequency injections. On January 9, 2009, Chan filed a request for a hearing regarding the determination arguing Torres' "condition became stationary and benefits should have been terminated long prior to" the November Notice of Determination. At the subsequent hearing, Chan contended the effective date to terminate benefits should have been March 14, 2007, when Dr. Terry McLean conducted an independent medical examination of Torres and found him stationary and in no need of supportive care.

¶3 At the hearing, the ALJ heard testimony from Torres, Dr. McLean, and Dr. Anghel. Torres testified that the March 2004 fall caused the back injury that Dr. Anghel treated him for in 2008. Dr. McLean testified that to a reasonable degree of medical probability the fall did not cause the injury treated in 2008 and no supportive care was needed. Dr. Anghel initially testified that to a reasonable degree of medical probability the fall caused the injury he treated. However, after learning more information about Torres' past medical visits and back injury

history, Dr. Anghel stated this new information "puts a big question mark" on his initial opinion that the fall caused the condition he was treating.

¶4 On June 30, 2009, the ALJ issued a decision finding Torres was entitled to supportive care and medical and disability compensation benefits from March 19, 2004 until November 13, 2008. In support of the award, the ALJ found "[t]o the extent there is a conflict of expert medical opinion, the opinions and conclusions of Dr. Anghel are adopted herein as being most probably correct and well-founded." Chan filed a request for review of the June 30 award, arguing no competent medical testimony shows that the industrial injury caused the back pain treated by Dr. Anghel in 2008. The ALJ issued a decision upon review affirming the June 30 award. In this decision, the ALJ indicated that he deemed Torres' credibility a material issue and found that "[Torres'] explanation of the history of the industrial injury and the history of the non-industrial events and the treatment for both the industrial injury and for those non-industrial events is reasonable and credible." Chan timely filed this petition for special action.

¶5 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10.

Discussion

¶6 We defer to the ALJ's reasonable factual findings but review legal conclusions *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We view the evidence in the light most favorable to sustaining the award and uphold the ALJ's findings if they are supported by reasonable evidence. *Anton v. Indus. Comm'n*, 141 Ariz. 566, 569, 688 P.2d 192, 195 (App. 1984).

¶7 Chan argues competent medical testimony does not support the award because (1) Dr. Anghel expressed substantial doubt as to whether the March 2004 fall caused the back condition he treated in 2008 and (2) Torres' testimony regarding his version of the events cannot establish medical causation.

¶8 The claimant bears the burden of establishing all elements of his claim throughout proceedings before the ICA. *Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284, 537 P.2d 1340, 1342 (1975). "Medical causation is established by showing that the accident caused the injury." *Keovorabouth v. Indus. Comm'n*, 222 Ariz. 378, 381, ¶ 7, 214 P.3d 1019, 1022 (App. 2009).

¶9 When medical conditions, like Torres' back complaints, are peculiarly within the knowledge of medical doctors, the ALJ's determination must be supported by competent medical testimony. *Stephens v. Indus. Comm'n*, 114 Ariz. 92, 95, 559

P.2d 212, 215 (App. 1977). Medical testimony is sufficient when shown to a reasonable medical probability that the industrial accident caused the injury. *Nelson v. Indus. Comm'n*, 24 Ariz. App. 94, 96, 536 P.2d 215, 217 (1975). When "the only expert testimony touching the problem of causation is 'impregnated with substantial uncertainty' and '* * * as a whole it is susceptible of an interpretation that the doctor is speaking more of possibilities than probabilities,'" appellate courts "'cannot require the commission to find a fact on possibilities.'" *Helmericks v. AiResearch Mfg. Co. of Ariz.*, 88 Ariz. 413, 416, 357 P.2d 152, 154 (1960) (quoting *Gronowski v. Indus. Comm'n*, 81 Ariz. 363, 366, 306 P.2d 285, 287 (1957)); *see also In re Bedwell's Estate*, 104 Ariz. 443, 445, 454 P.2d 985, 987 (1969) (finding the expert medical testimony was "so fraught with uncertainty" that there was a reasonable basis for the ALJ to deny death benefits); *Russell v. Indus. Comm'n*, 98 Ariz. 138, 143, 402 P.2d 561, 564 (1965) (construing its decision in *Helmericks* as holding "that *possibilities* are not sufficient to show causal relationship"). Thus, "if there are two or more possible causes for a disability and the medical testimony adduced to establish causality is couched only in terms of possibilities, then the claimant has not met his burden of proof." *Employers Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*,

17 Ariz. App. 516, 519, 498 P.2d 590, 593 (1972).

¶10 When viewed in its entirety, Dr. Anghel's testimony is "impregnated with substantial uncertainty" and falls short of the reasonable medical probability required to establish medical causation. On direct examination, the Special Fund's attorney and Dr. Anghel had the following exchange:

> Q. Yes. Did Mr. Torres give you any history that led you to make any non-industrial diagnoses?
>
> A. No, he did not report any other prior injuries.
>
> . . . .
>
> Q. In your opinion and to a reasonable degree of medical certainty, were the symptoms Mr. Torres related to you consistent with a slip and fall injury that would have occurred back in March of 2004?
>
> A. With a reasonable degree of medical probability, yes.
>
> Q. And in your opinion, were the injections that you provided to Mr. Torres reasonably necessary to treat the March 19th, 2004, injury?
>
> A. Well, the patient experienced adequate satisfaction following the treatment and adequate analgesic response, so yes.

Standing alone, this medical testimony is unequivocal and sufficiently supports the ALJ's award. *See Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, 536, ¶ 13, 19 P.3d 1248,

1252 (App. 2001) ("Testimony is 'equivocal' if it is subject to two or more interpretations or if the expert avoided committing to a particular opinion."). However, after learning additional information about Torres' medical history on cross-examination, Dr. Anghel significantly retreated from his initial opinion on causation and cast substantial doubt on his diagnosis of the lower back injury. First, Dr. Anghel testified that he diagnoses the cause of injuries based on "the accuracy of the history" he receives from the patient. He further explained:

> So, in other words, let's say the patient never had never -– prior to that accident never had any complaints of back pain and never had any prior treatments for back pain, I would just state with a reasonable degree of medical probability that those symptoms are related to the respective accident.
>
> However, if prior to that accident the patient displayed similar symptoms and receive [sic] treatment, then that statement could be flawed. So you just to have [sic] take it with a grain of salt, you know.

This explanation was consistent with Dr. Anghel's initial opinion because he testified on direct examination that Torres reported no other prior injuries.

¶11 However, Chan's attorney questioned Dr. Anghel about Torres' apparently undisputed medical history, which was largely unknown to Dr. Anghel at the time he treated and diagnosed Torres. The following exchange took place:

Q. Okay. Now, let me give you some additional facts and if you aren't aware of them tell me. Did you know that this injury -- well, you know that this injury occurred in March of 2004. Did you know that the patient did not seek medical treatment until January 31st, 2005?

A. No, I didn't know that.

Q. Okay. Did you know when he sought medical treatment on January 31st, 2005, which was, let's see, about a year or less than a year, nine months from his injury, his chief complaint was -- at Clinica Arizona was back pain times one and a half years, which would have placed it back in 2003.

A. Okay.

Q. You didn't know that, correct?

A. No. So, in other words, if he received treatment prior to this incident, obviously then he must have had a history of back problems.

Q. Well, I'll get to that. I'll get to that, Doctor. Did you know that when he was seen on January 31st, '05, which is nine months or so after this injury he gave a history of alcoholism, vomiting, excessive hunger, liver problems and mumps, but there was no history of this slip and fall we're concerned about today?

A. No, I'm not aware of that.

Q. You didn't know that. And that's the first time he sought medical treatment after the injury.

Did you know that he went to the emergency room at Maricopa Medical Center on March 4th, 2005, and his chief complaint was

> back pain since yesterday. In the written portion of the examination the patient had complaints in the upper back off and on since the motor vehicle accident in 2001.
>
> A. Oh, great, so he had a motor vehicle accident on top of that.
>
> Q. And it goes on to say the patient complained of worsening pain times two and was unsure if he was injured but was unable to work as a cook since January –- this is in March of ’05 -- because of pain with his back. Again, no mention of any lower back pain or an industrial episode of March 2004. I take it you were unaware of that as well?
>
> A. Sure, I haven’t received any records in that regard.
>
> Q. Well, now my question is: Considering these two visits I’ve just talked about, one at Clinica Arizona and one at Maricopa Hospital in which he did not give any history of this fall at work, does that cause you to question your previous conclusion that to a reasonable medical probability the back pain that you treated was due to the injury of March 2004?
>
> A. Yeah, that puts a big question mark on it.

¶12 On redirect, Dr. Anghel testified that he treated Torres only for lower back pain and that he “would expect that a slip and fall where someone fell on their buttocks would cause lower back pain.” Dr. Anghel acknowledged that Torres could have sustained two separate back injuries because his upper back pain from the 2001 car accident did not preclude him from having lower back pain from the March 2004 fall. Dr. Anghel also

testified that it is common for patients to "report what bothers them" when they seek medical treatment and it was reasonable for Torres to "only give [] a history about what he thought was wrong with his lower back."

¶13 This testimony, however, does not overcome the substantial doubt Dr. Anghel cast on his methodology for diagnosing Torres' injury. Dr. Anghel initially opined to a reasonable degree of medical probability that the March 2004 fall caused the lower back injury he treated because Torres reported no other prior injuries. Upon learning Torres' additional medical history, Dr. Anghel significantly questioned whether the fall caused the lower back injury. His statements on redirect only identify the March 2004 fall as one of the possible causes of Torres' lower back condition in 2008. Moreover, although Dr. Anghel stated that the information he learned during cross-examination about Torres' upper back would not have changed the course of treatment he administered to Torres, this statement offered no opinion on the cause of the condition. After receiving the new information about Torres' medical history, Dr. Anghel did not opine or reconfirm his earlier testimony that to a reasonable degree of medical probability Torres' lower back pain in 2008 was caused by the March 2004 fall. His concluding statement as to medical

causation, and his only statement after receiving the additional history, was that there was a "big question mark." On this record, Dr. Anghel's testimony was "impregnated with substantial uncertainty" and resulted in the March 2004 fall being a possible, not probable, cause of Torres' lower back condition.

¶14 Equivocal medical testimony, like Dr. Anghel's, is insufficient to uphold an ICA. award. *Marquez v. Indus. Comm'n*, 18 Ariz. App. 16, 18, 499 P.2d 747, 749 (1972); *see also Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 612, 545 P.2d 458, 460 (1976) (stating that "equivocal testimony cannot create a conflict in the evidence"). Here, the ALJ heard medical testimony from Dr. Anghel and Dr. McLean. Dr. McLean unequivocally stated to a reasonable medical probability that (1) the March 2004 fall did not cause the lower back condition treated by Dr. Anghel in 2008, and (2) Torres did not require supportive care due to the March 2004 fall. Although Torres testified that the March 2004 fall caused the lower back condition treated by Dr. Anghel, his testimony cannot prove medical causation. *Rosarita Mexican Foods*, 199 Ariz. at 535, ¶ 12, 19 P.3d at 1251 (stating we will uphold the ALJ's determination about "a matter peculiarly within the knowledge of medical doctors" so long as "competent medical testimony supported that determination"). Accordingly, because the ALJ

expressly relied on Dr. Anghel's testimony[1] – and that testimony is equivocal as to medical causation – the ALJ erred. The June 30 award is not, on this record, supported by competent medical testimony. That the ALJ found Torres' testimony credible is of no consequence when the opining doctor concluded the additional history put medical causation in doubt.[2]

Conclusion

¶15 For the foregoing reasons, we set aside the award.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge

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[1] The ALJ stated, "To the extent there is a conflict of expert medical opinion, the opinions and conclusions of Dr. Anghel are adopted herein as being most probably correct and well-founded."

[2] The Special Fund contends that the compensability finding barred Chan from arguing the 2004 fall did not cause the injury treated by Dr. Anghel in 2008. This argument is misplaced because there must be competent medical evidence that the industrial injury caused the condition for which the claimant received treatment. Here, the 2008 treatment rendered by Dr. Anghel had not occurred and therefore was not at issue when the ICA found Torres sustained a compensable injury.